



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

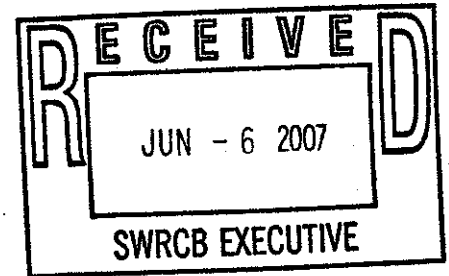
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Sent via E-mail

commentletters@waterboards.ca.gov

June 6, 2007

Attention: Song Her, Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Re: June 19, 2007 Water Right Enforcement Workshop

To the Members of the State Water Resources Control Board:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing over 91,500 farm families and individual members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Farm Bureau appreciates the opportunity to comment and hereby submits the following remarks regarding the *"Workshop to Receive Information Regarding Policy Direction on Water Right Enforcement."*

WORKSHOP SCOPE

Although enforcement is a critical and necessary component of any regulatory program, Farm Bureau believes that the scope of the June 19, 2007 workshop is too narrow and provides the wrong focus considering the systemic problems associated with the SWRCB's administration of water rights in general. The stated subject and purpose of the workshop is to "hear comments that will inform [the SWRCB's] policy direction on water right enforcement, including enforcement for violation of water right permit terms and conditions and for unauthorized diversion or water use." Rather than focusing on enforcement as the medium for addressing the programmatic problems, the workshop should be postponed to allow staff an opportunity to prepare a written evaluation of the following items:

- The causes of the current application and petition backlog;
- A quantification of the impacts associated with the pending applications and petitions;

- The nature and extent of permit license noncompliance;
- The reasons for, and delays associated with the Memorandums of Understanding for the associated CEQA process;
- The benefits and impediments to creating a special permitting and change petition program focused on streamlining and expediting minor/ministerial modifications;
- The estimated nature and extent of unauthorized water diversion and use; and
- The effectiveness of current and past enforcement practices.

After the completion of the report and prior to the postponed workshop, the public should be allowed an opportunity to provide written comment and/or other information regarding those issues discussed in the report.

INTERIM ENFORCEMENT STRATEGY

During the time SWRCB staff is preparing the report discussed above, Farm Bureau believes the SWRCB should immediately amend their enforcement strategy to encompass the following concepts:

Education and Outreach

The SWRCB should work with organizations and entities representing water rights holders to prepare and disseminate information regarding the legal and regulatory requirements for compliance. The informational materials should also include a discussion about the procedural steps and expected time for processing of the application or petition.

Reprioritize Enforcement Efforts

As a complimentary component to education and outreach, the SWRCB should reprioritize its enforcement efforts away from individuals who are in the process of making or have been identified as needing to make, non-substantive changes/updates to their water rights permits that have occurred as a result of things that include, but are not limited to, transfers of land and more precise data on location of diversion. Furthermore, enforcement should be prioritized to address recalcitrant individuals who have been adequately notified of their legal obligations and have failed to initiate steps to remediate the problem.

Progressive Enforcement

The SWRCB should also embrace the concept of progressive enforcement for those recalcitrant permittees similar to concepts articulated in the water quality program.

SPECIFIC RESPONSES TO WORKSHOP NOTICE QUESTIONS

1. Should the State Water Board adopt enforcement provisions in its AB 2121 policy?

The purpose of AB 2121 and Water Code section 1259.4 is to adopt principles and guidelines for in-stream flow protection in the North Coast region, but Water Code section 1259.4 says nothing about enforcement. Furthermore, the AB 2121 process has been occurring as a separate but concurrent process targeted at addressing in-stream flows. Therefore, Farm Bureau suggests that the initial focus of the AB 2121 policy should not include separate enforcement provisions until such time as the programmatic issues are identified, steps are taken to improve the system, and a uniform water rights enforcement policy exists.

2. Should the State Water Board adopt an enforcement policy for areas of the state that are outside the mandated geographic scope of the AB 2121 policy? If the State Water Board adopts an enforcement policy that applies to other areas of the state, should it contain the same enforcement provisions as the AB 2121 policy?

The SWRCB's enforcement policy should be applicable to the entire state to provide consistency for water rights holders and in implementation by SWRCB staff.

3. How should the State Water Board set enforcement priorities? What factors should it consider in setting enforcement priorities?

Enforcement priorities should principally be based on gravity of the violation and the general concept of progressive enforcement adopted in the SWRCB's water quality program.

4. Currently the State Water Board's Division of Water Rights (Division) identifies one or more watersheds per year in which it will conduct compliance inspections. In the past, watersheds have been selected after consultation with the Regional Water Quality Control Boards, the California Department of Fish and Game, and federal fishery agencies. The Division selects the watershed(s) on which it will focus its enforcement resources based on potential impacts to water quality and aquatic resources. The Division then conducts both investigations of unauthorized diversions and compliance inspections of permitted and licensed water supply projects within the selected watershed(s). Should the State Water Board continue to focus its water right enforcement resources on specific watersheds? If so, how should those watersheds be selected? If not, what other basis should be used?

In general, the risk based approach where the SWRCB is informed by cooperating state and federal agencies is a sound concept. However, Farm Bureau believes that the implementation of the "watershed approach" has resulted in a case of diminishing marginal returns. Enforcement should be focused on those watersheds, streams, and specific unauthorized water uses for which enforcement efforts would provide the most benefit. For instance, the SWRCB's initial focus on the Russian and Navarro watersheds made sense from a fisheries

perspective; however, after four years of compliance inspections and enforcement actions the program continues and most likely would benefit from an evaluation of return on enforcement investment.

5. *Should the State Water Board provide an opportunity for voluntary compliance or corrective actions before initiating formal enforcement actions and, if so, under what circumstances? How long a time should the State Water Board allow for voluntary compliance?*

The SWRCB should encourage permittees to make changes necessary to ensure that each permit fully complies with the law. However, as stated above, this endeavor must be accompanied by an education and outreach program and should also encompass known and definite timelines for completion.

The timeline for compliance should be fair, reasonable, and practicable provided SWRCB staff resources, administrative delays associated with public process, and ability to make programmatic improvements in the water rights system.

6. *The State Water Board has pending over 500 water right applications. Many of these applications were filed to seek authorization for existing, but unauthorized, water supply projects. Should the State Water Board initiate enforcement against existing applicants that are diverting water without authorization? Under what conditions should the State Water Board initiate enforcement actions against these applicants?*

In several instances, the SWRCB has encouraged water diverters to seek water rights permits, and in other instances individuals have voluntarily come forward to seek permits. In either situation, the SWRCB should review the individual circumstances surrounding the application and should not initiate rote enforcement actions. The underlying goal and focus of the program should be that of compliance, not enforcement.

7. *The State Water Board has pending over 600 petitions to change existing water right permits or licenses. Many of these petitions were filed to seek authorization for changes in place or purpose of use or point of diversion that have already taken place without seeking the required prior approval of the change from the State Water Board. Should the State Water Board initiate enforcement against existing petitioners that are diverting water in violation of the conditions of their water right permits or licenses? Under what conditions should the State Water Board initiate enforcement actions against these petitioners?*

As previously stated, in several instances the SWRCB has encouraged water diverters to file petitions to change and in other instances individuals have voluntarily come forward to "do the right thing." These efforts should not be frustrated by punitive enforcement actions. It is well recognized that the permitting and change petition system has flaws and Farm Bureau believes that it is to the benefit of current permit holders, future water users, the State, and the

environment to have cooperation in improving and ensuring an accurate and reliable water rights program.

8. *The State Water Board has four potential formal enforcement options available: (1) issuance of a Cease and Desist Order, (2) issuance of an Administrative Civil Liability (monetary penalty), (3) referral of the matter to the Attorney General for fines or injunction or both, and (4) revocation of a permit or license. In some cases, a violation may result in only one type of action, and in other cases, a violation could result in more than one type of action. What conditions should be present before the State Water Board considers imposing each of the potential enforcement options?*

Farm Bureau hereby incorporates by reference the separate June 6, 2007 letter jointly submitted by Farm Bureau and Somach, Simmons, and Dunn.

9. *If a Cease and Desist Order is determined to be appropriate, should the State Water Board provide an opportunity in the Cease and Desist Order for the recipient of the order to continue to divert water while coming into compliance? If so, what conditions and time schedule for compliance should the State Water Board impose? What other factors should the State Water Board consider in determining a reasonable time schedule for compliance to be included in any Cease and Desist Order?*

Yes, in most cases the recipient of a Cease and Desist Order should be allowed to continue to divert water. The circumstances surrounding each Cease and Desist Order will be unique and should warrant individual evaluation.

10. *Under what circumstances, if any, should a Cease and Desist Order require the permanent removal of an illegal diversion facility?*

Generally, a diversion should be permanently removed only where there is no other legal option to bring the diversion into compliance and the facility poses a significant and irreversible harm to the environment or other legal water users.

11. *The State Water Board has the authority to issue Administrative Civil Liability (ACL) of up to \$500 per day of unauthorized diversion and use or up to \$1000 per day for violation of a Cease and Desist Order. If an ACL complaint is deemed appropriate, how should the monetary penalty be calculated in order to ensure that the monetary penalty is effective in compelling compliance with water right law? What factors should the State Water Board consider in setting the amount of the monetary penalty?*

A Cease and Desist Order is appropriate where a water user has failed to come into compliance after having been given a fair and adequate opportunity to comply. ACL should be computed according to a sliding scale based on the severity of the impact, the intent of the

diverter, and the deterrence effect and should be offset by actions to bring diversions into compliance and avoid or mitigate adverse impacts.

12. What factors should the State Water Board consider when determining whether to refer a violation to the Office of the Attorney General for prosecution?

Referrals to the Attorney General should be reserved for the highest priority alleged violations where a significant litigation defense is likely to occur.

13. What factors should the State Water Board consider when determining whether to revoke a water right permit or license as a result of violation of permit or license terms?

A permit or license should be revoked only for the most significant violations, and after the permittee or licensee has failed to come into compliance after having been given a fair and adequate opportunity to comply.

14. The State Water Board has the authority to revoke water right permits and licenses if the water right fees due on the permit or license are not paid for five or more years. Should the State Water Board consider revoking water right permits and licenses for failure to pay water right fees? If so, under what conditions should the permit or license be revoked?

Permits and licenses should not be revoked for non-payment of fees. It is especially inappropriate to consider revoking permits and licenses where the SWRCB has been directed by the Court of Appeal to develop a revised fee schedule that complies with California law and addresses concerns about fairness to water right holders.

CONCLUSION

To be viable, any water rights enforcement policy must take into account fully the systemic problems plaguing the SWRCB's administrative program. Therefore, Farm Bureau recommends that the SWRCB stay the proposed workshop and direct staff to prepare a report on those issues identified above. This would allow the SWRCB and water rights holders to engage in a meaningful discussion about new approaches to water rights administration in order to alleviate the administrative backlog prior to the adoption of a formal enforcement policy.

If you have any questions, please do not hesitate to contact me at (916) 561-5614.

Sincerely,



JOHN HEWITT